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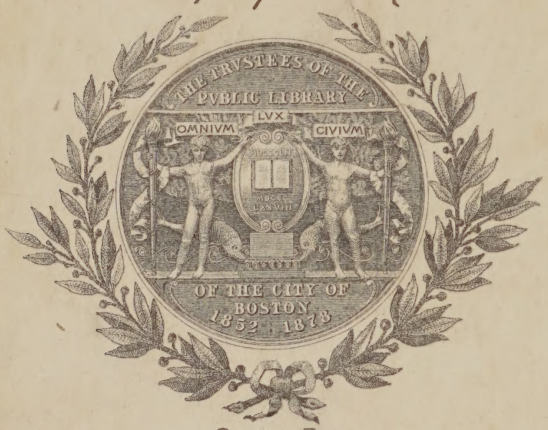

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THE OLD DIPLOMACY

ARBITRATION

AND

THE PERMANENT TRIBUNAL

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By EDWARD EVERETT HALE.

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The Old Diplomacy, Arbitration and the Permanent Tribunal.

Let us remember, as a foundation in all these discussions, that what is called diplomacy is really as much out of date as is plate-armor or a mail shirt or archery or hunting with falcons. For a person who has eight days in the week nothing could be more entertaining than to study the origin of modern diplomacy, its development, and its preservation now among the other etiquettes of the past. It has done a certain duty in the past, as plate-armor did, and as falcons did. But now what is done is done outside of its forms and its etiquettes, and these forms and etiquettes are preserved simply for record, or, if you please, to place the final seal on transactions which are wrought out elsewhere.

We still have ambassadors and ministers plenipotentiary and chancelries and attachés. And so we still have plate-armor; there are two large factories in Europe which are devoted to the making of plate-armor which is very good plate-armor. The demand for it in the opera-houses is sufficient to maintain these institutions. And so we still have at the great cities ambassadors, who are very good fellows and do very good work. They prepare the way, in a fashion, and they keep excellent record of what is going on; but the business of the world is not transacted by them.

The world indeed, since this century began, has been looking round, more or less uneasily, for better methods of achieving its purposes than the methods employed,

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say by Philip II, Henry IV and Queen Elizabeth. The gentleman or lady who is studying the history of diplomacy may connect with this study the progress which has been made in new devices.

Of these devices the methods of what we call Arbitration are by far the most striking. They are so successful that we cannot but congratulate ourselves on their achievements. What is called Arbitration amounts to this: two nations have come to issue on some point which concerns them both;—a good instance is the arbitration of the northeast boundary question, between Maine on the one hand and New Brunswick and Canada on the other. The United States had its construction of the Treaty of Paris of 1783, as to the line of boundary to be run, which was to be on the highlands which separate the waters flowing into the Atlantic from the waters flowing into the River St. Lawrence. The English government had another construction of this same article of this same treaty. The question at issue was whether the St. John River did or did not "flow into the Atlantic." It discharges into the Bay of Fundy, which discharges into the Atlantic. Was it then a river flowing into the Atlantic, or was it not? The United States said that it was, the English government said it was not, and that therefore it must not be considered in drawing the line of highlands.

The diplomatic system amounted to this, that the Secretary of State at Washington produced every reason in his power to show that in the minds of the seven men who made the Treaty of Paris there was but one thought: that they regarded all rivers which did not flow into the St. Lawrence as flowing into the Atlantic. If they made no mention of the St. John,—and they did not,—it was

simply because it seemed to them so clear that the name of the bay which received its waters was of no consequence, that they classed it with all the other rivers on the south side of the boundary line. Against this the English government presented all their reasons for considering that the line should run south of the St. John, and that its waters should be treated as if they did not exist.

On an issue like this, diplomatists could spend hundreds of years if they wanted to. There have been such questions which have been open for that length of time. The United States government and the English government after a diplomatic discussion of fifty years determined to leave this question to the arbitration of the King of the Netherlands. This does not mean that the King personally considered the subject; it means that he selected competent and impartial students who should consider it and who should report to him. The King of the Netherlands was a respectable person, who had no special prejudices in favor of either power. He accepted the proposal, and he made a report. His report was that neither of the two parties had maintained its claim, and that he would make a new line, between the two, not pretending that it was the line of the treaty, but pretending that it was a good line which they had better both establish.

Each party refused to be bound by the arbitration. They said he had not done what he was appointed to do; and the whole matter was left for further negotiation.

When, in the year 1842, Sir Robert Peel came into power in England, he determined to settle the question. He sent over to America Lord Ashburton, a gentleman who, as one of the Barings, had very large financial re-

lations with America, and was well known and esteemed here. On our side, Mr. Webster was then at the head of the Department of State. Lord Ashburton and Mr. Webster met, Mr. Webster brought together experts from Massachusetts and Maine, and so gathered a staff of seven people around him. He was the eighth, Lord Ashburton was the ninth, and they agreed together, as a body of men of sense, that they would abandon the old treaty of 1783, and make a new line. They made a line and that line is now the line between the two countries. This was no triumph of diplomacy; it was a frank rejection of the old methods of diplomacy. And such a transaction is one of the movements of this century which show that old-fashioned diplomacy cannot be trusted in such affairs, and that you have to devise some method, as Sir Robert Peel did, more in consonance with what we may call the business habits of the time.

The intercourse of nations is so much larger than it was in the times of Queen Elizabeth, and the personal relations of individuals so much closer, that there is something absurd in the diplomatic pretence. It is absurd to pretend that any gentleman, however well informed, who represents the Queen of England, meeting with any gentleman, however well informed, who represents the President of the United States, can even begin to express or to carry into effect such arrangements as are necessary in the mutual intercourse or in the commerce between the nations called England and the United States. A very pathetic illustration of the failure of any reliance upon such agents was in the famous Jay Treaty of the end of the last century. Jay was a man as well informed as most Americans of his time. The English government, of course, took counsel which they thought

good. But they made a treaty of commerce which made no reference to the fact that cotton was raised in the United States. Nobody connected with the treaty on either side knew that it was raised in the United States. And that treaty had to meet a terrible storm of indignation in America. The men of affairs, who did know that there had come in this new-born stranger who was to be a giant in the line of international commerce, were able to twit the diplomatists who had made that treaty with their ignorance of a factor so important.

It may readily enough be said, however, that the real business of diplomatists is not to open new channels of intercourse, but that it is to smooth the intercourse which exists and remove causes of complaint. Should there turn up ground of quarrel between the two nations, is it not well that there should be, at the capital of each, a representative of the other, who may make or obtain the necessary explanations? In theory this sounds very well. But what happens in practise?

Suppose in Delagoa Bay an American schooner is unloading lumber. Suppose a midshipman from one of the Queen's ships comes on board on some errand or other, and he and the American skipper get into a quarrel. Perhaps the midshipman has to be ejected forcibly; perhaps not. But each of them is very angry,—perhaps each of them is a little drunk,—and each swears revenge. So soon as the schooner returns to America her captain reports what he calls the facts at his headquarters. Before that time a report has gone to England of the insult given to an English officer. Here is ample ground for war, on the old theories of war. Jenkins's ear is not more important than the slap in the face which one of these two men may or may not have given the other.

What possible chance is there of obtaining the truth in the diplomatic contest which is to follow? The American skipper and one or two of his crew are examined at Washington, and they tell the story in their own way and with their own color. Nobody cross-examines them, the offending parties have no opportunity to hear them; but careful statements of their evidence are laid before the proper officials in our State Department. They issue the proper instructions to the United States minister in England, and he, by virtue of his office, is bound to take our side. He does take it, takes it through and through.

Exactly the same thing is gone through on the other side. Each government educates a set of men who understand about the Delagoa incident. These men persuade themselves of the absolute right of their own view. You could carry on discussion, on such a basis, for a hundred years, and come to no settlement. Neither party has any power to cross-examine witnesses. The cases are confessedly made up on *ex-parte* testimony, and have to run the chances of such *ex-parte* testimony in the decision which must be arrived at.

This Delagoa case is pure imagination. I do not know that we ever send lumber to Delagoa Bay. But anybody who will read the long and rather dreary discussions of the Venezuela case will see how great is the danger of pure *ex parte* opinion. It has been whispered that Lord Salisbury himself, when at last he was obliged to give his personal attention to the details of this controversy, was surprised to find what was the class of errors into which the advocates of England's claim in the English Foreign Office had been led by the documents which they had on their files.

Now there were more than seventy-five important arbitrations in the seventy-five years which followed the Treaty of Ghent. Here was an immense step forward in international relations. Our own country took advantage of arbitration in the well-known instance of the northwestern boundary, when we accepted the adverse decision of the Emperor of Germany; of the Alabama claims, when England accepted the adverse decision, and subsequently in the Alaskan contention. But while we acknowledge all that was thus gained, one cannot but remember how much dissatisfaction these awards gave, and one cannot but ask how much was to be expected from such tribunals.

For the purpose of these arbitrations, seventy-five distinct tribunals, more or less, were established; and these tribunals ceased to be tribunals as soon as the award was made. There was therefore in no case any prestige, in the court making the decision, gained by its earlier successes; nor indeed were the persons who constituted such tribunals in the least prepared by previous experience in the same line. They were all novices. Worse than this, in no case had they any power to call witnesses, excepting so far as the courtesy of the different states suggested. When the King of the Netherlands had referred to him the northeast boundary question which has been alluded to, the English government had and knew it had in its possession, in the King's own library, a map on which the *American* line was drawn distinctly, with the manuscript statement, "This is the line agreed upon by the Commission." The English government did not consider that it was their duty to bring this map before the King of the Netherlands, and he never knew that it existed. Many years after Mr.

Sparks discovered in France the celebrated "red line map," which favored the *British* claim, though it had no manuscript statement, and no one knew what was its origin. He gave the American government the knowledge of this fact, and they did not consider it their business to apprise Lord Ashburton of its existence. Every arbitration has been obliged to act with the consciousness that each party was putting its best foot foremost, and no one of them has had any power to call for witnesses as to the existence of another foot, or to cross-examine witnesses. The great arbitration of the Alabama claims was decided by a court which had only the testimony which the two countries brought before it, and which had to judge for itself of the value of that testimony.

Such are the reasons for saying that as the century has worked along, the progress of man has proved the necessity of a Permanent Tribunal between states, which should be in session all the time. It should be entrusted, first, with power to lay down certain fundamental principles of international law. This is not impossible, nor even difficult, for the study of the theory of international law has gone on, not interrupted by diplomatists, who have not had much to do with it, but asserting itself more and more in the affairs of commerce and nations.

Second, this Tribunal, permanently established, must have power to call for witnesses, wherever they may be, and to authenticate written statements wherever they may be made.

Third, it must have power to establish its own rules of procedure, and it must fix reasonable times for the hearing and adjudication of questions brought before it.

Fourth, these questions must be international questions. The court is not established to define the rights of indi-

viduals, or to decide in their controversies. It is established simply to give to one nation an opportunity to prove a case in a contention with another nation.

Fifth, this court need not define, nor need anybody define, what class of questions the nations shall thus bring forward. Come who will! The court *exists*, and it exists to promote international justice. As was well said by a member of the New York State Bar Association, it hangs out its sign, "International Justice Administered Here."

Sixth, having hung out its sign, this court hears all international cases brought before it. It hears counsel on each side, and examines the testimony which they bring forward. If necessary, it calls for more testimony. If necessary, it refers questions to masters and it demands reports on side issues from experts. Having thus informed itself, this court pronounces its decision.

Now when that decision has been made, in such a way, no power can stand against it. New questions may be brought up; but that question, in the minds of men and in the public opinion of the world, will be considered as decided. The question need not be asked what army or what fleet shall enforce these decisions.

In saying all this, one is simply following the great analogy of the Supreme Court of the United States. There are forty-six states which submit all their interstate questions to the decision of the Supreme Court. Every year the Supreme Court decides such questions. It has decided such questions for a hundred years. Unfortunately, the Constitution itself waived the right of considering the question of slavery among those questions. But with the exception of this question, thus taken away from the decision of the Supreme Court, it

has made no decision which has not on the instant been silently obeyed. *Vox populi, vox Dei*; and the will of the people of America expresses itself in the decision of the Supreme Court.

It should be remembered that the great treaty which has distinguished the names of Lord Salisbury and Mr. Olney failed simply on questions of detail respecting the cases which might and might not be brought before the tribunal which they established. The treaty expressed this in these words:

ARTICLE IV.

All pecuniary claims or groups of pecuniary claims which shall exceed £100,000 in amount, and all other matters in difference, in respect of which either of the high contracting parties shall have rights against the other under treaty or otherwise, provided that such matters in difference do not involve the determination of territorial claims, shall be dealt with and decided by an arbitral tribunal constituted as provided in the next following article.

But it appeared at once that such a treaty was binding the hands of the men of the future. The men of the future will not like to have their hands bound, and will be very apt to protest against decisions made in advance, as to what is a "question of honor," for instance. It was therefore the great advantage of the other plan,—that presented by the New York State Bar Association,—that it prescribed no restriction on the questions which might be brought, if both parties agreed. It did not compel them to bring their cases to the international tribunal, any more than a man is compelled to bring an action against another man. If he prefers to let the matter grind along without trial, he can do so. This open permission to the nations to use the new tribunal is proba-

bly necessary in inducing them to agree to establish it.

The different plans which have been suggested for the personnel of such a tribunal are interesting, but they are not fundamentally important. The important thing is that the personnel shall be such as to command the respect and confidence of the world from the beginning. If the United States of America commissioned its two most distinguished jurists to such a court, if England did the same, and France the same, there would be a beginning. Let these six gentlemen meet, and let them determine on three men well known in the world as students of international law, whom they will add to their number. Here you would have a tribunal of nine, well fitted for the beginning of this great enterprise. It has always seemed to me that it would be well to add to this tribunal six assessors, not of the same rank as the nine judges, but such as could represent the smaller states of Europe and America, and such as could be relied upon, perhaps in holding local inquiries in regions where such inquiries have to be made. If such a court existed, if only the questions between these three nations, England, France and America, were submitted to it, its decisions would at once attract attention and would command the respect of the world. At some fortunate moment, Germany would ask to be received into the circle of its operations. Russia would have the same wish, Austria would not be left out, and probably the smaller states would be more eager than the six great powers to join in so simple an arrangement for deciding questions of fact and law, such as make the difficulties between nations.

The court would be established, then, and it would *exist*. If established on a provision of sufficient dignity, it would so exist that nations would be glad to bring

many cases under its decision. It will study such cases, and will make its decision. Such a tribunal as we propose would command respect for these decisions, however slight the subjects which were involved. The question, not in itself important, whether the interesting race of seals shall exist or shall not exist in 1950, would be brought before it. Some wretched question of boundary between Costa Rica and Nicaragua would be brought before it;—whether the St. Matthew River were ever called the St. Mark, or whether that river exists at all;—some of the Venezuelan questions were as trivial as this. With every new decision the new tribunal would gain prestige and authority, and now any two nations which had cause for controversy, instead of having to create a new court, out of new cloth, with inexperienced judges and with no traditional forms of precedure, would come before the International Tribunal, knowing what testimony it was to bring, how it was to authenticate its claims, and sure of an impartial hearing of its arguments.

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